Supreme Court of the United States.

OCTOBER TERM, 1921.

IN THE MATTER

of

ELMORE D. DIER, HARRY J. LAWRENCE, JR., LAWRENCE STARR, individually and as co-partners doing business under the firm name of E. D. DIER & Co., and E. D. DIER & Co.,
Alleged Bankrupts,
Appellants.

SUPPLEMENTAL MEMORANDUM OPPOSING FURTHER STAY.

The affidavit made by Mr. Rockwood on May 11th, 1922, in support of the motion to advance the cause for argument and for other relief, contains the following allegations [p. 4]:

> "The bankrupts thereupon filed assignments of error and prayed for leave to appeal to this court, which was granted. Appeal was thereupon perfected, bond given, and necessary cash deposit made with the clerk of this court for printing the record."

A subsequent affidavit made by Mr. Rockwood contains the following allegations [p. 6]:

> "I have read the affidavit of Assistant District Attorney John Caldwell Myers, verified May 12, 1922, in opposition thereto. There was no unnecessary or unusual delay either in perfecting the appeal herein or in the matter of having the record printed. The appeal was perfected on April 13, 1922, three days after the said appeal was allowed. The deposit of $85 with the clerk of this court for printing the record was made promptly."

It will be observed that in neither affidavit did Mr. Rockwood give the date when the deposit for printing was made. The records of the Clerk of this Court show that the deposit was made on April 29th, 1922. This was 19 days after the allowance of the appeal. We submit that in view of the fact that the stay granted by the District Court was for 30 days only, a delay of 19 days in making the deposit for printing was wholly inexcusable. It seems to us that the appellants have been guilty of such laches that they are not entitled to ask for a further stay. But wholly apart from the question of laches, there are good and sufficient reasons for denying the application for a further stay. These reasons are, according to our view, that the appellants have absolutely no right to the injunctive relief which they seek, and that the injunction proceedings have been instituted and are being prosecuted solely for dilatory purposes.

In the memorandum for the appellants in support of the pending motion, some significance seems to be attached to the fact that the District Attorney has joined in the motion to advance the cause for argument. The District Attorney has

done this, not because he has any doubt as to the lack of merit in the appellants' application for injunctive relief, but because it is his practice to proceed as speedily as possible in disposing of matters pending in his office.

Undoubtedly, due process of law should be observed in prosecutions for crime. The legal rights of the accused should be scrupulously respected. This is true, no matter how atrocious the crime may be, and no matter how vile or how mean the criminal. The District Attorney of New York County believes in this doctrine and practices it. But, of course, the primary purpose of the law is not to protect the rights of the accused, but to protect society by punishing the criminal. And when a person accused of crime claims a right which, if allowed, will interfere with his prosecution, it is incumbent upon him to show clearly that his claim is well founded.

We have here a very remarkable situation. The appellants, prior to the bankruptcy proceeding, were engaged in conducting a so-called stock brokerage business. They did business on a large scale and had thousands of customers. Their business was conducted in such a way that a large percentage of their customers were defrauded. Many of their victims have suffered severe losses. Such investigation as has been made has developed the existence of a grave scandal. The operation of the business was interrupted by the institution of the bankruptcy proceedings. Upon the appointment of the receiver in the bankruptcy proceedings, the books, records and papers which had been used in carrying on the business passed into the hands and possession of the receiver; and the bankrupts [the appellants herein] did not assert

any constitutional right or privilege in respect to the use which should be made of such books, documents and papers.

Any constitutional right or privilege which the bankrupts may have had in regard to the use of the books, records and papers as evidence against the bankrupts in a criminal prosecution were waived by the failure of the bankrupts to assert such right or privilege at the time they parted with the possession of the books, etc. This point is made very clear in the opinion rendered in this proceeding by the judge of the District Court. A copy of that opinion is hereto annexed, marked "Exhibit A." The District Court's opinion was based upon the opinion of this court in *Johnson* v. *United States* (228 U. S. 457). The *Johnson* case is controlling in the case at bar. The only difference between the two cases is that in the *Johnson* case the books had passed into the hands of the trustee, whereas in this case, they have passed into the hands of the receiver. But there is no distinction whatsoever in principle between the two cases.

We respectfully submit, on the authority of the *Johnson* case, that the order of the District Court, from which the pending appeal has been taken, should be affirmed by this court when it is considered on the merits, and that, therefore, the appellants should not be granted a stay pending the hearing and determination of the appeal.

Numerous complaints have been made which justify the District Attorney in believing that the appellants in this case, or some of them, committed crimes against the laws of the State of New York in the course of the conduct of their so-called brokerage business. It is necessary for the Dis-

trict Attorney of New York County to examine the books, records and papers used in the conduct of the said business before he can determine whether there is sufficient evidence to support criminal prosecutions. The continuance of the stay restraining the receiver from obeying a *subpoena duces tecum* will prevent the District Attorney from performing his duty in the premises. The bankrupts, who are believed to have engaged in unlawful practices, are in court, but not as defendants. They are in this court as complainants, with the District Attorney of New York County as a virtual defendant. There is no merit in their contention, and we feel that they are trifling with the courts and with the District Attorney. We respectfully submit that this condition should not be allowed to continue.

We have endeavored to show that there is no foundation for the appellants' claim that the seizure of the books under the process of the State courts would invade their constitutional rights and privileges. It seems to us that there can be no doubt as to what the law is on this question. But even if the question were not free from doubt, we still feel that there should be no further stay. If an indictment is found and it is based upon evidence which is incompetent because seized in violation of the constitutional rights of the defendant, a motion to dismiss can be made on that ground; and if the motion is denied an exception can be taken which will save the question for review in the appellate courts. Similarly, if incompetent evidence is admitted at the trial, over appropriate objection and exception, and a conviction is had, the reception of the evidence may be reviewed on appeal; and if it is claimed that a right guaranteed

the defendant by the Constitution of the United States has been denied, the judgment of conviction may ultimately be reviewed in this court.

Respectfully submitted,

JOAB H. BANTON,
District Attorney,
New York County.

JOHN CALDWELL MYERS,
Of Counsel.

May 19, 1922.

Exhibit "A"

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER *of* E. DIER & Co., *Ex-parte:* ELMORE D. DIER.	31368.

This proceeding comes up on rule *nisi* to enjoin a receiver in bankruptcy and the District Attorney of New York County from using the books, and papers of the alleged bankrupt firm before the Grand Jury of the Supreme Court of New York. A petition was filed against the firm of which the petitioner was a member, and a receiver appointed. The alleged bankrupts without objection surrendered possession of the books to the receiver, who now holds them. The District Attorney of New York County, contemplating criminal prosecution of the petitioner, has demanded possession of the books for presentation to a Grand Jury. The petitioner asserts that such surrender would violate his constitutional privileges under Articles 4 and 5 of the U. S. Constitution.

NASH ROCKWOOD, for the rule.

JOAB H. BANTON, District Attorney, opposed.

LEARNED HAND, D. J.

It may be accepted that Judge Holt's ruling in *re* Harris, 164 Fed. Rep. 293, had the approval of the Supreme Court in the appeal in that case, in re Harris, 221 U. S. 274. There the alleged bankrupt resisted the surrender of his books to the receiver and was eventually protected to the extent that though he must surrender, it was on condition that the books should not be used by the receiver in aid of any criminal prosecution against him. Thus a compromise was effected between the right of his creditors to administer his assets and his own right not to produce evidence against himself.

In Johnson *v.* U. S. 228 U. S. 457, the bankrupt had without reservation surrendered his books to a trustee and these were thereafter used against him in a criminal trial over his objection. The point involving his constitutional privilege went to the Supreme Court and was ruled against him. The theory of the case was that once possession and title passed without protest from the bankrupt his privilege ended.

"A party is privileged from producing the evidence, but not from its production" (p. 458). In the case at bar there is indeed no trustee, only a receiver, and a receiver has no title, but that I conceive makes no difference. The production depends as little upon compelling the incriminated person to produce evidence against himself, when the possessor has no title as when he has. The possessor alone can produce, not the owner, and the privilege protects only against such compulsion. See also in *re* Tracy, 177 Fed. Rep. 532, and in *re* Mandel, 224 Fed. Rep. 642. The test I take

is whether the surrender was resisted when the receiver demanded possession.

Cases like Boyd *v.* U. S., 116 U. S. 616, Weeks *v.* U. S. 232 U. S. 383, and Silverthorne Lumber Co. *v.* U. S. 251 U. S. 385, are not in point. In each the possessor of the evidence was forced to produce by illegal means, and this was held to taint, as it were, the evidence, so that not even information might be used, which was derived during the unlawful possession. Gouled *v.* U. S. 255 U. S. 298 extended the rule to evidence procured by fraud. None of them touches the competency of proof which has been surrendered without claim of privilege made at the time when the privilege could have been effectively asserted.

Nor is Arndstein *v.* McCarthy, 254 U. S. 71, nearer. That case decided that the declarations contained in schedules did not open the door to examination generally of the bankrupt's assets. It would apply only in case the alleged bankrupts here were examined upon the transactions contained in the books and papers. No one suggested that the schedules themselves were privileged in favor of the bankrupts. Had that been the ruling, as, for example, it was before the repeal of R. S. Sec. 860, Johnson *v.* United States, 163 Fed. Rep. 30, something might be said in the case at bar for the privilege, not under the Constitution, it is true, but under the statute. Nothing of the sort now stands in the way, certainly not Arndstein *v.* McCarthy, *supra.*

Rule discharged.

L. H.,
D. J.

February 27, 1922.